

**ALCINDOR v R**

**(2013) SLR 379**

N Gabriel for the appellant  
E Gonthier for the respondent

23 September 2013

CN 49/2012

**BURHAN J**

[1] This is an appeal against conviction and sentence.

[2] The appellant was charged in the Magistrates' Court as follows:

Statement of offence

Possession of Controlled Drugs Contrary to Section 6 (a) as read with Section 26(1) (a) and Punishable under Section 29 (1) of the Misuse of Drugs Act Cap 133.

The particulars of the offence are that Kelson Alcindor, a beach boy, residing at Beau Vallon, Mahe, on the 15th day of October, 2010, at the junction of Les Mamelles road, Mahe, has in his possession 42 milligrams of heroin (Diamorphine) a controlled drug.

[3] The appellant denied the charge and after trial the Senior Magistrate proceeded to find the appellant guilty as charged and proceeded to sentence him to a term of six years imprisonment.

[4] Counsel seeks to appeal against that conviction and sentence on the following grounds:

a) the learned Magistrate failed and erred in law in failing to properly consider the Appellant's defence when he stated under oath that the second person standing next to him had thrown the suspected drugs on the ground.

b) the sentence imposed by the learned Magistrate is manifestly harsh and excessive given that the drugs in question weighed 42 milligrams. The sentence does not reflect recent patterns of sentencing for similar offences involving similar quantities of heroin before the courts in this jurisdiction.

c) the learned Magistrate before passing sentence should have looked into the special circumstances as provided in law as why the minimum mandatory sentence should not be imposed.

[5] The background facts of the case are that agent Pierre Servina of the NDEA (National Drug Enforcement Agency) whilst on mobile patrol at around 7 pm on 15 October 2010 at the junction at Les Mammelles, had noticed the appellant Kelson Alcindor walking in their direction. He had disembarked from the said vehicle together with agents Malbrook and Hoareau and approached the appellant. They had been in uniform. As they approached the appellant he had thrown a piece of

white paper on the ground. Agent Servina had picked up the paper and opened it and found it contained a powder which they suspected to be controlled drugs. They had proceeded to arrest him and have the powder in the white paper analysed. Agent Servina further identified the appellant as the person he had arrested that day and stated he worked as a beach boy at Beau Vallon. The Government Analyst's, Mr Purmanan's, evidence and report confirmed the fact that the said powder was Heroin Diamorphine having a weight of 42 milligrams. Agent Mellissa Malbrook was also called by the prosecution while agent Seeward gave evidence in respect of the exhibit kept in his custody.

[6] I have considered the reasoned judgment of the Senior Magistrate Mrs Samia Govinden. I have noted that she has analysed the evidence of the prosecution and the evidence given by the appellant in detail, prior to coming to her findings. It is clear when one considers the evidence of the prosecution that the evidence of the principal witness agent Servina stands corroborated by the evidence of agent Mellissa Malbrook. There are no material contradictions in the evidence of the prosecution witnesses that would make one come to a conclusion that their evidence is untruthful and cannot be believed. The chain of evidence in respect of the exhibit from the time of detection, analysis and production in court has been established and not contested. For the aforementioned reasons the Senior Magistrate cannot be faulted for accepting the evidence of the prosecution.

[7] The Senior Magistrate has further analysed the evidence of the appellant in detail. She has come to the conclusion that the defence of the appellant, that he was coming from his mother's place and that he had met another person by the name of Antoine a "rasta" who had been standing near him at the time the NDEA officers arrived on the scene is not acceptable. It appears even though he had not seen it, his defence is that it was this person who had thrown the white paper on the ground. However in the cross-examination of all the prosecution witnesses no such suggestion was made by counsel for the defence. Therefore the Senior Magistrate's conclusion that the defence was a sham and part of a recent story on his part cannot be faulted. It is apparent that the defence is a last minute fabrication and a belated attempt to pass on the guilt to another individual. For the aforementioned reasons it cannot be accepted that the Senior Magistrate failed or erred in law in failing to properly consider the appellant's defence as suggested by counsel for the appellant. Therefore ground (a) of the appeal in respect of the conviction bears no merit.

[8] For the aforementioned reasons the appeal against the conviction of the appellant stands dismissed.

[9] In regard to the appeal against sentence, it is the contention of counsel for the appellant that the sentence imposed is harsh and excessive. His main ground is that the Senior Magistrate had not taken into consideration the special circumstances as required by law and should have done so and not given the minimum mandatory term of imprisonment. When one considers the facts of this case and the plea in mitigation made by counsel namely that the appellant is a first offender, a young man and apologises for his crime and that the court should consider the quantity of controlled drug taken into custody, these facts either on their own or taken together in the view of this Court, do not constitute any special circumstance for the sentence to be reduced below the minimum mandatory considering the fact it was a Class A drug that was found in his possession.

[10] Counsel for the appellant also drew the attention of the Court to art 15 of the International Covenant on Civil and Political Rights (ICCPR).

[11] Article 15(1) and (2) of the said Covenant reads as follows:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for an omission which, at the time when it was committed, was criminal according to the general principle of law, recognised by the community of nations.

[12] What attracts the attention of this Court is the last limb of art 15(1) of the Covenant namely:

If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

[13] The offence in this instant case was committed on 15 October 2010. According to the law prevailing at that time the maximum penalty prescribed by law was 15 years and included a minimum mandatory term of imprisonment of five years for offences concerning possession of Class A controlled drugs which would be applicable in this instant case.

[14] However at the time of conviction and sentence on 6 November 2012 the law had changed and the Misuse of Drugs (Amendment) Act, Act 4 of 2012, did not impose a minimum mandatory term of imprisonment for the offence with which the appellant has been charged with in this case, therefore it is apparent subsequent to date of the commission of the offence, provision has been made by law for the imposition of a lighter penalty. The question now arises whether in terms of art 15(1) of 384 the ICCPR the appellant in this case should benefit from it.

[15] When one considers art 19(4) of the Constitution of the Republic of Seychelles it reads as follows:

Except for the offence of genocide or an offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.

[16] It therefore is apparent that while a part of art 15(1) of the Covenant has been

incorporated in the domestic law the last limb namely: “ If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” has not been incorporated in any domestic law. Therefore the relief as envisaged by the Covenant cannot be applied to this instant case as it does not form part of the domestic law and for the same reason art 48 of the Constitution of the Republic of Seychelles is not applicable. Counsel for the appellant is however free to challenge this finding in a higher forum.

[17] Counsel for the appellant has brought to the attention of this Court an extract from Sentencing Theory and Practice by Nigel Walker at paragraph 1.22 which reads as follows:

... Or again it may reduce or vary the sentence-  
even if only slightly- to give weight to a mitigating  
factor which should have, but did not influence the  
sentence

[18] It appears that although being in possession of a quantity of 42 milligrams does attract the minimum mandatory term of imprisonment, even though the charge is of a serious nature as it is in respect of a Class A drug, considering the quantity involved which in the view of this Court is small and the fact that the appellant is a first offender when taken together these facts would have been sufficient grounds in the view of this court, to impose the minimum mandatory term prescribed by law ie five years imprisonment. Therefore this Court will proceed to substitute the sentence of six years imprisonment with a sentence of five years imprisonment. Subject to this variation in sentence the appeal stands dismissed.